

Session 6

Removal Standards
Qualified Expert Witnesses

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- Questions asked throughout case:
 - Can the child safely remain in the home?
 - If the child has already been removed, can the child safely return to the home?
 - Should the child be removed permanently from the parents' custody?
- Legal terms: “removal standards” and “qualified expert witness”
- Standards depend on stage of case

Emergency Removal

- Under ICWA, state law governs emergency removal to prevent imminent physical harm to child
- State law authorizes OCS to take emergency custody of child without a court order if:
 - Abandonment
 - Neglect; immediate removal necessary
 - Physical harm; immediate removal necessary
 - Sexual abuse of child or sibling
 - Runaway child, custody necessary to protect child
- OCS conducts safety assessment to determine whether to exercise authority to remove child

Emergency Removal (cont'd)

- ICWA Regulations: Emergency removal ends in one of three ways:
 - Initiation of CINA case subject to full protections of ICWA
 - Transferring jurisdiction to the appropriate Tribe
 - Restoring child to parent
- State law: If OCS takes emergency custody
 - CINA petition filed in court within 24 hours
 - Initial court hearing held within 48 hours of petition being filed
- ICWA Regulations: Emergency custody can last no longer than 30 days

Foster Care Placement

Party seeking a **foster care placement** must prove by **clear and convincing evidence**, including testimony from **qualified expert witnesses**, that **continued custody** by parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

- Definitions to follow....

Failure of proof: child returned home, but CINA case remains open.

Definitions

- “Foster care placement”
 - Any action removing an Indian child from home for temporary placement in a foster home or institution where a parent cannot have the child returned upon demand
- “Clear and convincing evidence”
 - Evidence that gives the judge a “firm belief or conviction” that the child will likely suffer harm
- “Continued custody”
 - Physical and/or legal custody that a parent already has or had at any point in the past

Termination of Parental Rights

- Termination of parental rights is a permanent removal of the child from the parent's custody
- ICWA requires proof **beyond a reasonable doubt**, including testimony of qualified expert witnesses, of likely harm
 - Highest standard of proof: "beyond dispute that any alternative is reasonably possible"
- State law has additional requirements that OCS must prove to terminate a parent's rights

Qualified Expert Witness

- The term “qualified expert witness” is not defined in ICWA and has been the subject of much litigation in Alaska
- Legislative history:
 - Congressional finding that removal of Indian children was often unwarranted
 - Intent to prevent courts from basing decisions solely upon testimony of social workers who possess neither the specialized professional education nor familiarity with Native culture necessary to distinguish between cultural variations in child-rearing practices and actual abuse and neglect.

Qualified Expert Witness (cont'd)

- 2016 ICWA Regulations
 - Expert **must** be qualified to testify regarding likely harm to child
 - Expert **should** have specific knowledge of Tribe's social and cultural standards
 - Unless plainly irrelevant (e.g. sexual abuse)
 - Courts to exercise extreme caution in determining that cultural knowledge is plainly irrelevant
 - *Cannot* be caseworker assigned to case
 - Tribe/BIA can be asked to help locate expert